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THE LIMITS OF THE DOCTRINE OF TRACING.

THE doctrine of tracing is of great antiquity in English Law though it has progressed and attained a considerable degree of refinement only in more modern times. The doctrine itself has a two-fold aspect and can be stated thus: "If a trustee has, in breach of trust, converted trust money into some other form, the property into which it has been so converted becomes subject to the trust . . . . Any gain accrues to the trust estate and any loss falls on the trustee. Secondly, if a trustee has mixed trust moneys with his own, or has, partly with his own and partly with trust moneys, purchased other property, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property so purchased. If however, the mixed fund can be traced (into whatever form it may have been converted) the beneficiaries will be entitled to a first charge on it". (Underhill's Law of Trusts and Trustees, 8th Edition, p. 481). The guiding principle is that a trustee cannot assert a title of his own to trust property. In the words of Lord Ellenborough in *Taylor* v. *Plumer* (1) "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with them". The doctrine cannot obviously apply where the trustee destroys a trust fund by dissipating it altogether, for, in that case there remains nothing to be the subject of a trust and the remedy is to proceed against the trustee personally. But, where there is property in the hands of a trustee into which it can be shown that the trust fund has gone, the *cestui que trust* can assert a lien over the entire property. In other words if once it be shown that a trust fund has gone into a business, the means of ascertainment fail only when it can be shown that the trust fund has been destroyed or dissipated.

1. (1815) 3 M & S 562 : 105 E R 721.

In early times the doctrine was freely applied to the case of factors. Thus it was held that goods entrusted to a factor could be recovered by the principal on the insolvency of the factor without his ranking as a creditor. But a difficulty was experienced in tracing the principal's fund where it consisted of money. It was held in a number of cases [See *Whitecomb* v. *Jacob* (2), *Ryall* v. *Rolle* (3), *Ex Parte Dumas* (4), *Scott* v. *Surman*(5) and *Ex Parte Sayers*(6)] that money could not be followed, in the way that goods could be, because money had no earmark, and that if the trust fund was in the form of money at the time of bankruptcy the principal could only rank with the other creditors. But early enough a distinction was drawn between money kept in a bag and separate from other moneys of the trustee and money mixed and confounded with that of the trustee. It was held that in the former case alone could the *cestui que trust* trace and recover the money. Thus in *Tooke* v. *Hollingworth* (7) Kenyon, C. J., said: "If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay, if goods be sold and reduced into money, provided that money be in separate bags and distinguishable from the factor's other property, the law is the same."

Similarly in the well-known case of *Taylor* v. *Plumer* (1) Lord Ellenborough, C. J., observed: "If the property in its original state or form was covered with a trust, no change in that form can divest it of such trust. It makes no difference in reason or law into what form the change may have been made . . . The right only ceases when the means of ascertainment fail." He added that the means would fail in a case "where the subject is turned into money and mixed and confounded with the general mass of the same description." Sir George Jessel, M. R., pointed out in *Hallett's case* (8) that the statement of the law in the passage extracted above was correct but that the statement of fact in the last clause was incorrect and

1. (1815) 3 M & S 562 : 105 E R 721.
2. (1742) 1 Salk. 161 : 91 E R 149.
3. (1749) 1 Atk. 165 : 26 E R 107 4. (1754) 1 Atk. 232 : 26 E R 149.
5. (1742) Willes 400 : 125 E R 1235.
6. (1800) 5 Ves. 169 : 31 E R 528.
7. (1793) 5 T R 215 : 101 E R 121. 8. (1880) 13 Ch. D 696.

attributed the error to the fact that that eminent Judge's knowledge of the rules of equity was not quite commensurate with the knowledge of the rules of common law. But the real truth is that the doctrine had attained a degree of refinement by the time *Hallett's case* (8) was decided which it had not during the time of *Taylor* v. *Plumer* (1).

What a strong hold the old view that money had no ear-mark and consequently could not be followed unless kept separate had on lawyers' minds may be seen from the fact that a great equity Judge like Justice Fry considered it to be too well established to be disturbed. In *Ex parte Dale & Co.* (9), the bankers were authorised to collect a sum of money and send it on to their employer. Instead of doing so they entered it into their general account. It was held by Fry, J., that the doctrine of following was inapplicable because the money was not kept separate. A relic of this old view is found in the judgment of Lopes, L. J., in *In re Hallett & Co.* : *Ex-parte Blane* (10). He observes "if trust money can be traced, it is liable to be followed by the trustee in bankruptcy, but if it has been mixed up with other money so as not to be distinguishable it cannot be followed . . . The money was not ear-marked and cannot be identified".

But this process of sitting on the fence could not continue for long, because of the obvious difficulty of following money by reason of its character of being currency. A departure from the old view was for the first time made in the case of *Pennel* v. *Deffel* (11). There Lord Justice Knight Bruce supposes the case of a trust fund kept separate and then refers to the case of a trust fund mingled with money belonging to the trustee. Then he says : "But not in either case would the blending together of the trust money, however confusedly, be of any moment as between various *cestui que trustent* on the one hand, and the executors representing the general creditors on the other." In another famous passage the same Judge observes: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have

1. (1815) 3 M & S 562: 105 E R 721. 8 (1880) L R 13 Ch. D 696.
9. (1879) L R 11 Ch. D 772. 10. L R (1894) 2 Q B 237.
11. (1953) 4 De G M & G 372 : 43 E R 551.

done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestui que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on the one hand and the trust on the other". To the same effect Lord Justice Turner observes thus in the same case: "It is an undoubted principle of this court that between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust". *Pennel* v. *Deffel* (11) has not attained the celebrity which the judgment of the Master of the Rolls in *Hallett's case* (8) has. But it was in that case that the doctrine was stated and applied in its extended form. And the very judgment of Sir George Jessel, M. R., in *Hallett's case* (8) is merely an elaborate discussion why that case rather than the judgment of Fry, J., in *Ex-parte Dale & Co.* (9) should be followed.

One more case may be referred to at this stage and that is *Frith* v. *Cartland* (12). There Vice-Chancellor Wood approved of *Pennel* v. *Deffel* (11) and said: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole of it will be treated as the trust property, except so far as he may be able to distinguish what is his own. The sole question is whether the property can or cannot be identified."

Now we come to the case of *In re Hallett's Estate* : *Knatchbull* v. *Hallett* (8). There it was laid down that the doctrine of tracing was applicable to all persons who held funds under a fiduciary relationship. But the more important principle therein laid down was that equity could follow trust money even if put into a bank or undistinguishable mass. The

8. (1880) L R 13 Ch. D 696. 9. (1879) L R 11 Ch. D 772.
11. (1853) 4 De. G M & G 372 : 43 E R 551.
12. (1865) 2 H & M 417 : 71 E R 525.

agent had in breach of his duty paid the money of his principal into his bank so that it formed part of a general debt due to him on current account with the bankers. It was held that the indebtedness was for a single sum of which the amount of the principal's money formed an integral part. The loan to the banker was regarded as an investment *pro tanto* of the principal's money and the latter was treated as entitled to waive the breach of duty by his agent and to claim the investment to the extent of the amount due to him. The agent could not set up any part of the money in the bank was his until he had made good his breach of duty and in that sense there was a charge. *Hallett's case* (8) is memorable because of this valuable remedy it gave the *cestui que trust,* namely, to claim a charge on the mixed assets.

Thus in the words of Sir George Jessel by a "gradual refinement of the doctrine of equity" the point where exactly the means of ascertainment fail has been pushed back and the remedy which began as one *in personam* became a right to property, and in this connection the decision of the House of Lords in *Sinclair* v. *Brougham* (13) calls for more than a passing notice. It was not a case of fiduciary relationship. A building society contrary to its objects of association began to increase its deposits and do banking business. When it went into liquidation it was found that there remained a sum of money over and above the amount payable to the creditors. But the same was not sufficient to meet the claims of the shareholders and depositors. The question arose how that money was to be distributed. It was held by the House of Lords that the money deposited gave rise merely to an *ultra vires* contract of loan, that it did not become the property of the shareholders and that so long as they could identify it they might trace it through any number of changes. As Haldane, L. C., observes at p. 419 : "Whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can follow, but only so long as the relation of debtor and creditor has not superseded the right *in rem,* provided it could be earmarked or traced into assets acquired with it." Similarly Lord Dunedin observes at page 437: "If the proceeds of property can be shown to be a superfluity in the person of the recipient, the Court may hold that the property is traced just as surely as if it was still in its original form".

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8. (1880) L R 13 Ch. D 696. 13. L R (1914) A C 398.

Thus for the first time almost the rational basis of the doctrine of tracing that it was founded on the right of property was enunciated. From that was drawn the corollary that the rule was not confined to cases of fiduciary obligation but was applicable to every case where property was not intended to pass or could not pass. From this again would follow the rule that the right existed so long as the property was not destroyed. The other point decided by the case was that for the purpose of tracing, a mass of assets, to which it could be shown that the trust fund had contributed, might be taken as an entity and that the *cestui que trust* could in such cases claim a lien on the mass. The mode by which their Lordships arrived at the conclusion that the fund to be traced had gone into the assets is also of great interest. The value of the assets then belonging to the society was greater than the amount contributed by the shareholders. It was therefore evident that the depositors' money had gone into the assets. When once that was proved the depositors began to have a right *in rem* in regard to that property. If the shareholders or the directors had stood in a fiduciary relationship to the depositors, the latter would have been entitled to claim a lien on the assets until their amount was paid in full. But, not having any superior equity over the shareholders, the depositors were allowed only to share rateably with the shareholders. It is evident from several passages in the judgment of their Lordships that the result would have been different, if there had been a fiduciary obligation in the case.

After *Sinclair* v. *Brougham* (13) the rule as to tracing may be stated thus: If once it is shown by a *cestui que trust* that the trust fund has augmented the assets of the trustee the right to claim a lien subsists so long as it is not shown that the property is destroyed or dissipated. Thus on the one side the doctrine cannot be invoked if the fund has not been specifically thrown into the trust estate. The decision in *In re Hallett & Co. Ex-parte Blane* (10) is explainable that way There the trustees of a fund directed their bankers who had notice of the trust to collect certain debuntures forming part of the trust fund. The bankers owed a sum of money to the company and the amount due to the trust estate was adjusted towards the amount due to the company. The bankers became bankrupt. It was held by the Court of Appeal reversing a judgment of Vaughan Williams, J., that the doctrine of tracing was inapplicable. As Esher, M. R., said: "Hallett & Co. (the bankers) did not in fact

10. L R (1894) 2 Q B 237. 13. L R (1914) A C 398.

receive any money or tender of money or anything tangible which it would be possible to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Blane (the *cestui que trust*) might have followed it; but he cannot show that; ...... all that can be shown is a settlement of account and a settlement of acount cannot be followed". The same case affords an illustration of the other limit to the doctrine, namely, that the fund cannot be traced if it has been dissipated. The bankers appropriated and expended the fund to their own purposes and it was lost to the trust estate. All the cases which are supposed to lay down a principle contrary to that in *Hallett's case* (8) may be explained in this manner. As Thesiger, L. J., observed in that case: "All cases where it has been held that moneys mixed and confounded, but still existing, in a mass cannot be followed, may be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent."

There is one other aspect of the doctrine which did not arise in *Hallett's case* (8). It assumed that there was a continuous balance standing to the credit of the account equal to the balance against which the charge was claimed. What should happen if the mixed fund had been operated upon to such an extent that, besides exhausting the trustee's own money, a portion of the trust fund had been withdrawn and the trustee subsequently invested money in that account? Vice-Chancellor Wood observed thus in *Frith* v. *Cartland* (12): "*The fund, the trustee has got, must answer the trust to the *cestui que trust* so long as there is money remaining from the original transaction which the Court can trace to fix the trust upon. Therefore it does not come to what was said in argument that according to that so long as a man has any money in his hands it is to be so treated . . . Suppose a trustee sells £1000 worth of stock and spends the money instead of re-investing it in other stock and after that another fund comes to him by way of legacy, you cannot fasten the trust upon that legacy; the trust fund is

*This passage appears only in 34 L J Ch. 301 at p. 304.

8. (1880) L R 13 Ch. D 696.

12. (1865) 2 H & M 417 : 71 E R 525 : 34 L J Ch. 301 at p. 304.

gone, it is annihilated; but, so long as you can trace it, so long as the trustee has one six pence of the trust property traced to his hands, trust property it is and his own title cannot be asserted in any way in respect of it".

The question directly arose for the first time in *James Roscoe (Bolton), Ltd.* v. *Winder* (14). There the facts were similar to those in *Hallett's case* (8), with this difference that, although there was a large ultimate balance, there had been only a very small intermediate balance. A company had authorised *W* to collect all its book debts amounting to about £600. *W* collected the amount and paid £450 into his bank account. Subsequently he drew out a large portion of the money for his own purposes and not in payment of the book debts so that at one date the balance had dwindled down to £25. *W* later on paid in and drew out other moneys so that at his death there was a credit balance of £350 in the bank. In an action by the company claiming a charge on the entire balance, Justice Sargant held that the lien was enforceable only on the intermediate balance of £25. An argument was advanced that the banking account should be looked at as a whole and that the fluctuating balance was subject to one contractual charge or trust. It was rightly rejected, for "one must for the purpose of tracing, which was the process adopted in *Hallett's case* (8), put his finger on some definite fund which either remains in its original shape or in its altered form". It was also pointed out in that case that if the trustee had by any act of his expressed an intention to make good the loss to the trust estate then the charge may be enforced against the ultimate balance.

Hallett's case (8) decided one other principle which has been uniformly followed in subsequent decisions. It laid down that, when payments were made by the trustee out of the general account, the payments were not to be appropriated against the payments to that account as in *Clayton's case* (15), because the trustee should be presumed to be honest rather than dishonest and to make payments out of his own private moneys and not out of the trust fund that was mingled up with his private moneys. Thus the earlier cases of *Pennell* v. *Deffel* (11) and *Brown* v. *Adams* (16) applying the rule in *Clayton's case* (15) were overruled. But the rule of specific appropriation of earlier items of credit in discharge of earlier items of debit is even now

8. (1880) L R 13 Ch. D 696. 11 (1853) 4 De. G M & G 372: 43 E R 551
14. L R (1915) 1 Ch. 62. 15. 1 Mer. 572: 35 E R 781.
16. (1869) L R 4 Ch. A 764.

applicable as among competing *cestui que trust* [See *Hancock* v. *Smith* (17), *In re Stenning* (18) and *In re Oatway* (19).]

Before leaving the subject, reference may be made as to how the law stands as regards the *onus* of proof in cases where the doctrine of tracing is invoked. The matter was put clearly by Lord Eldon in *Lupton* v. *White* (20) thus : "If a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole trust must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorised mixture on his part". The rule thus stated has been uniformly applied in subsequent cases. Of course the initial *onus* is upon *cestui que trust* to show that the trust fund was or must have gone into the general assets. The question of *onus* thus becomes material only in cases where the trust funds and the trustee's funds have been mixed and are not capable of apportionment. It has also assumed great importance in cases where the trust fund has been utilised along with the trustee's money in investments in business or in the purchase of land. The rule as to *onus* of proof was recently applied by a Bench of the Madras High Court [see *Lanka Tulasamma* v. *Guntapalli Venkatasubbayya* (21)] to the case of an *executor de son tort* mixing up his own moneys with that of a Hindu widow to whom he stood in a fiduciary relationship.

The right of the *cestui que trust* to follow trust property was raised in a series of Madras cases which arose in the insolvency of Messrs. Arbuthnot & Co. All the learned Judges who decided the cases uniformly recognised the principle laid down in *Hallett's case* (8), the difficulty resting merely in the application of the doctrine. Their Lordships, Benson and Wallis, JJ., observed thus in the *Official Assignee of Madras* v. *Smith* (22): "If A and Co. received the sum in question in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvents on the principle, explained by Sir George Jessel in *In re Hallett's Estate* (8), that where a person mixes money, which it was his duty to keep separate, with his

8. (1880) L R 13 Ch. D. 696. 17. (1889) L R 41 Ch D 456.
18. L R (1895) 2 Ch. D 433. 19. L R (1903) 2 Ch 356.
20. (1808) 15 Ves. Jun. 432 : 33 E R 817
21. (1925) I L R 48 M 597 : 49 M L J 220. 22. (1908) I L R 32 M 68

own moneys and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use rather than the money which he had the right to dispose of ".

Similarly Munro, J., observed in *Official Assignee of Madras* v. *Ramachandra Aiyar* (23) that "money held by a banker in his fiduciary capacity may, if he fails, be recovered in full out of the general assets". In the same case, Abdur Rahim, J., begins with a long statement of the law. He says "the doctrine of following trust property is no longer confined to properties which are capable of being traced *in specie* although it might have been so in olden days. The modern developments of equity enables the court to follow the trust money in all its transmutations and to seize upon the fund or property into which it is traced for the purpose of making good thereout the trust funds. The inviolability of trust money is carried still further. If a person holding money in trust or *quasi trust* mixes it with his own money and then draws out a portion of the blended fund for his own use, he will be held to have drawn his own moneys and no portion of the trust money........ It is only when trust property is shown to be destroyed by misappropriation or otherwise and only to the extent that it is destroyed that the court of equity will deem trust property to be lost...... It is now settled law that the equitable doctrine as to following trust property belonging to one person in the hands of another applies in all its refinements not only to the ordinary cases of trust but of *quasi-trust* such as when money or other form of property is placed in the hands of an agent or a factor for an especial purpose". In another passage the same learned Judge observes: "Before the rule as to following can be applied you must first of all find that the money in question was held in some kind of fiduciary character and where that is wanting the rule cannot apply". This last statement of the law may be open to doubt after the decision of the House of Lords in *Sinclair* v. *Brougham* (13). Each one of the Arbuthnot cases was decided on the particular facts but as pointed out above the English Law as laid down in *Hallett's* case (8) was clearly recognised and applied. [See *Official Assignee of Madras* v. *Lupprian* (24), *Official Assignee of Madras* v. *The Oriental Life Assurance Co.* (25), *Official Assignee of Madras* v. *Krishnaswami*

8. (1880) L R 13 Ch D 696. 13. L R (1914) A C 398.
23. (1909) I L R 33 M 134. 24. (1909) I L R 33 M 145.
25. (1909) I L R 33 M 150.

Naidu (26), *Official Assignee of Madras* v. *Krishna Bhatta*(27) and *Official Assignee of Madras* v. *Rajam Aiyar* (28), *on appeal from Official Assignee of Madras* v. *Rajam Aiyar* (29).]

With great respect it has to be said that the recent decision of His Lordship Justice Kumaraswami Sastri, in *Krishnajee Bhat* v. *Sadasiva Tawker* (30) was not rightly decided. The father of the minor plaintiff had entrusted a sum of money to T & Sons, the terms being that T. & Sons should invest the amount at 9 per cent. in their firm or in any other firm as they might deem fit, the amount itself being payable to the plaintiff on his attaining 21 years. T and Sons became insolvent and the plaintiff sued to recover his moneys. His Lordship held applying the principle in *Hallett's case* (8) that the trust fund could be recovered. It may at once be pointed out that the whole case proceeds upon an assumption, namely, that the use of the fund for the business of T and Sons was a breach of trust, whereas in fact it was expressly authorised by the terms of the trust. As His Lordship rightly observed "A trustee cannot use the trust fund for his own purposes. But it is always open to the author of the trust to make a provision to the contrary and remove one of the disabilities, a disability which prevents him from using the money for his own benefit". And this is exactly what was done in the case. In this connection reference may be made to certain passages which appear in the judgment reported in *Official Assignee of Madras* v. *Krishnasami Naidu* (26). There, Munro, J., said "the trustees were directed by the deed to invest the money entrusted to them in a particular way. They did so, and when they have done so their only liability under the trust deed was to renew the deposit from time to time and apply the interest as directed. If the investment turned out badly and the money invested was lost owing to the failure of the bank, the money could be recovered only from the assets of the bank by proving in insolvency". His Lordship Justice Abdur Rahim put it more forcibly thus: "If the settlor chose to make it a term of his settlement that the money should be lent to the trustees themselves hoping to get a profitable return then it is the misfortune of the beneficiaries if the trustees become bankrupts and they must be content to rank as ordinary creditors".

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8. (1880) 13 Ch D 696. 26. (1909) I L R 33 M 154.
27. (1910) I L R 34 M 128. 28. (1910) I L R 36 499 (F B).
29. (1909) I L R 33 M 299. 30. (1926) 24 L W 869.

The decision of his Lordship Justice Waller in *In the matter of M. A. R. N. Firm Insolvents* (31) seems to have been correctly decided in view of the present state of the English Law. There was a fiduciary relationship between the parties and it was admitted that the utilisation of the fund for the trustee's business was wholly unauthorised. Under those circumstances the trust fund was rightly allowed to be traced into the mass of general assets belonging to the trustee-insolvent.

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Mylapore. *Vakil, High Court.*

SUMMARY OF ENGLISH CASES.

MERZ *v.* SOUTH WALES EQUITABLE MONEY SOCIETY, (1927) 2 K. B. 366 (C. A.).

Promissory note—Execution in favour of secretary of company—Company beneficially interested—Legality—Money-lenders Act, 1900, *S.* 2, *sub-section* 1 (*c*).

S. 2, sub-section 1 (*c*) of the Money-lenders Act, 1900, provides that "A money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name."

Certain persons borrowed a sum of money from the respondent company which was registered under the Money-lenders Act, but the promissory note was executed in the name of *W* or other secretary for the time being of the company. In an action for a declaration that the promissory note was illegal and void.

Held, reversing a judgment of Wright, J., that the promissory note was not in the registered name of the company, that it could not therefore be sued upon by the company and was therefore void and unenforceable.

Quaere : Whether a promissory note payable to bearer or indorsed in blank by the promisee and then taken by the money-lender as security would be within the Act?

31. Unreported Application No. 418 of 1927 in I. P. No. 278 of 1925.

EVANS *v.* PIAUNEAU, (1927) 2 K. B. 374 : 96 L. J. K. B. 734.

Alien—Change of name—Addition of words "& Co." for business purposes—Effect—Aliens Restriction (Amendment) Act, 1919, *S. 7, sub-section* (1).

S. 7, sub-section (1) of the Aliens Restriction (Amendment) Act, 1919, runs thus: "An alien shall not for any purpose assume or use or purport to assume or use or continue after the commencement of this Act the assumption or use of any name other than that by which he was ordinarily known on the fourth day of August, one thousand nine hundred and fourteen."

A French subject, named *P. P.* and known as such on August 4, 1914, commenced a business in England in 1926 under the name of *"P. P. & Co."* The question arose whether there was a change of name or a mere change of style.

Held, that *"P. P. & Co."* is a name and that the alien subject in so describing himself assumed a name different from that by which he was ordinarily known at the material date, thus violating the provisions of S. 7, sub-section (1) of the Aliens Restriction Act.

COLLINS *v.* HENRY WHITEWAY & CO., (1927) 2 K B 378.

Defamation—Libel—Communication to 'Court of Referees' under Employment Insurance Act, 1921—*Privilege.*

A Body called the "Court of Referees" was constituted under the Unemployment Insurance Act of 1921 to decide disputes as to unemployment benefits on a reference by the insurance officers. A letter alleged to contain a libel was written to that body and the question arose whether it was a privileged communication.

Held, by Horridge, J., that the Court of Referees merely discharged administrative duties which need not be performed in Court but in respect of which it was necessary to bring to bear a judicial mind and that consequently the communication was not absolutely privileged.

Royal Aquarium and Summer and Winter Garden Society v. Parkinson, (1892) 1 Q B 431, at pp. 447, 448 and 452, relied on.

FAREY *v.* COOPER, (1927) 2 K. B. 384 (C. A.).

Goodwill—Deed of assignment—Agreement to aid in realisation of property—Covenant not to solicit customers whether implied—Instigation by third party to solicit customers—Liability.

The rule in *Trego* v. *Hunt* (1896 A C 7) that a person who voluntarily disposes of the goodwill of his business cannot canvass the old customers does not apply to the case of the sale of the debtors' business by the trustee under a deed of assignment unless there is a covenant to that effect. The mere fact that the debtors in such a case agreed to "aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors" does not give rise to an implied covenant not to do anything which will depreciate the value of the property as by soliciting the old customers. In such a case the debtors cannot be restrained by injunction from soliciting customers and a third person who instigates such conduct cannot be made liable in damages for procuring the breach of a covenant.

Per Bankes, L. J.—Assuming an implied covenant not to solicit customers can be made out as between the trustee and the debtors the third person will be liable only if it is shown that he knew of the obligation and infringed it.

Judgment of Finlay, J., reversed.

Walker v. *Mottram* (19 Ch. D. 355), discussed; *Green & Sons (Northampton)* v. *Morris,* (1914) 1 Ch. 562, approved.

PALMOLIVE CO. (OF ENGLAND) *v.* FREEDMAN, 96 L. J. Ch. 402.

Contract—Price maintenance agreement—Reasonableness—Public policy—Restraint of trade—Injunction to enforce contract.

The plaintiff company, who sold a certain toilet soap, entered into a price maintenance agreement with the defendant, who was one of their customers, by which he was assured of certain bonus terms on his agreeing to sell the soap "however acquired" at such prices as may be fixed by the company. Thereupon the company supplied goods to the defendant but it appeared that he sold the same at less than the fixed price. In an action by the company to enforce the contract by an injunction. the defendant pleaded that the goods he sold had been purchased by him from sources other than the company.

Held, by Astbury, J., that the contract was reasonable and not one in restraint of trade or opposed to public policy and that the injunction should be granted in order to secure its performance irrespective of the source of supply of the goods.

PUTSMAN *v.* TAYLOR, 96 L. J. K. B. 726 (C. A.).

Restraint of trade—Agreement of service—Promise not to engage in business for five years at three places—Validity—Severability of contract.

A contract of service provided that, after the termination of the period of employment, the employee, who was well-known as a man of experience and ability, should not, for a period of five years and within the three places of business of his employer, be employed in any capacity with any person carrying on business similar to that of the employer.

Held, affirming a judgment of the Divisional Court in (1927) 1 K. B. 637 that the contract taken as a whole was a reasonable protection which the employer was entitled to stipulate and that the same was not one in restraint of trade. [It was considered unnecessary to go into the question of the severability of the contract.]

WOOLWICH CORPORATION *v.* ROBERTS, 96 L. J. K. B. 757 (H. L.).

Local Government—Borough Council—Excessive payment to employees—Order of surcharge—Legality.

Where a borough council went on making payments to employees on the Fulham and Industrial Council's scales ignoring the fact that they were temporary arrangements and the auditor surcharged the councillors for the amount paid as wages in excess of the reasonable rate.

Held, by the House of Lords affirming a decision of the Court of Appeal that the order of surcharge was rightly made.

Per Lord Phillimore.—"It seems sometimes to be forgotten that the council of a borough is not the employer. It is only the steward of the rate-payers and inhabitants, and must act as a faithful steward."

Roberts v. *Hopwood,* (1925) A. C. 578 applied.

OAKLEY *v.* WILSON, 96 L. J. K. B. 783.

Landlord and tenant—Relationship when arises.

Per Acton, J.—"The relation of landlord and tenant in its ordinary legal significance arises whenever one party confers

on another the right to exclusive possession of premises, for example, of a dwelling-house, for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from year to year or of a quarterly, monthly, or weekly tenancy. This relation is created by contract to which there is usually, though not necessarily, incident a right on the part of the landlord to receive from the tenant payment for the use of the premises in the shape of rent.... The relation of landlord and tenant is fully established only when the tenant has entered on the premises let in pursuance of the contract."

IN THE ESTATE OF LAVINIA MUSGROVE; DAVIS *v.* MAYHEW, (1927) P. 264 : 96 L. J. P. D. & A. 140 (C. A.).

Will—Proper execution—Non-disclosure by executrix for twenty-five years—'Omnia rite esse acta'—*Applicability.*

The testatrix bequeathed her properties to the illegitimate daughter of her cousin by a will dated 1890 and died in 1905. The mother of the legatee who was appointed executrix did not put forward the will down to her death which occurred in 1924. The legatee having predeceased her mother, her husband who found the will in a desk belonging to the executrix propounded the will. It was found that the testatrix was a good business woman and that the will was in proper form, the signatures of the executant and of the attesting witnesses who were dead having been proved.

Held, reversing a judgment of Hill, J., that the maxim *"omnia rite esse acta"* would operate in favour of the will, after the proof given of the execution and attestation, to establish that the testatrix knew and approved of its contents. The suspicion arising from the fact of non-disclosure of the will by the executrix throughout her lifetime would be immaterial, the same having arisen at a later date when the will had begun to run its course as an effective instrument.

DONALD CAMPBELL & CO. *v.* POLLAK, (1927) A. C. 732 (H. L.).

Practice—Costs—Discretion of Trial Court—Appeal—Error of Law.

Where the trial Judge decided the issues of fact in favour of the defendant but gave judgment for him without costs on

the ground that he had been guilty of improper conduct and the Court of Appeal reversed the order as to costs on the ground that the discretion was wrongly exercised.

Held (Viscount Sumner and Lord Shaw dissenting) that although the House will not review an exercise of discretion as to costs, it will entertain an appeal for costs only where the order of the Court of Appeal is founded on an error of law. Also that, where the discretion as to costs has been exercised judicially, the Court of Appeal cannot, under law, entertain an appeal against the order merely because in its opinion the reasons alleged are insufficient.

JONES *v.* SOUTH-WEST LANCASHIRE COAL OWNER'S ASSOCIATION, (1927) A. C. 827 (H. L.).

Income-tax—Mutual Insurance Association—Annual surplus—Liability to income-tax.

An association had for its sole effective purpose the indemnity of its members against liability for compensation in respect of fatal accidents to workmen in their employment. It was a purely mutual concern, every person indemnified being a member of the association and every member being indemnified by the association. Under the articles of association a fund was to be established by means of "ordinary calls" to be made yearly upon the members in proportion to their disbursements by way of wages or salaries; out of this fund the members were to be indemnified against claims for compensation, and at the end of each year the surplus of the fund over the expenditure and liabilities of the association was to be carried to a reserve fund. The association was also empowered to make "extraordinary calls" upon the members for the purpose of meeting any deficiency in the fund or for strengthening the reserve. There were provisions for substitution in the case of the death of a member or transfer of his interest in the concern and for payment of a gratuity to a retiring member. The funds were to remain with the association and in the event of a winding up were to be divided among the members in proportions prescribed. The question arose whether the association was assessable to income-tax in respect of the surplus of its receipts in each year over the expenditure for the year as being profits of a trade or business.

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Held, affirming a decision of the Court of Appeal in (1927) 1 K. B. 33 that the association was not liable to income-tax on the annual surplus.

New York Life Insurance Co. v. *Styles,* (1889) 14 A. C. 381, followed.

BAKER *v.* ARCHER-SHEE, (1927) A. C. 844 (H. L.).

Income-tax—Foreign will—Legatee resident in England—Income not remitted to England—Liability for income-tax.

A person in the United States left a will by which he directed the trustees who were resident in that country to hold the settled residue upon trust to apply its income and profits to the use of his daughter for her life. The trustees were given full power to invest and re-invest the trust fund subject to the consent of the legatee. The trustees paid the net income belonging to the daughter who was in England to her order at a bank in America. The question arose whether the income was assessable to income-tax under Case IV of Schedule D of the Income-tax Act, 1918.

Held (Viscount Sumner and Lord Blanesburgh dissenting) that the income was liable to income-tax.

Decision of the Court of Appeal reversed; judgment of Rowlatt, J., restored.

METROPOLITAN MEAT INDUSTRY BOARD *v.* SHEEDY, (1927) A. C. 899 (P. C.).

Statutory Board—Control by Crown—Wide powers of management—Receipts not part of State revenue—Debt due to Board whether Crown debt—Priority—Meat Industry Act of New South Wales, 1915.

The Meat Industry Act of New South Wales, 1915, established the appellant Board, vested certain properties in that body and provided for the regulation of the slaughter of cattle and for other ancillary purposes. The Governor of the State appointed the members of the Board and could veto certain of their actions; he also appointed the officers for the administration of the Act on the recommendation of the Board. But otherwise the Act conferred on the Board wide powers which were to be exercised at its own discretion and without consulting the representatives of the Crown. Also the Board paid its receipts not into the general revenue of the State but into its own fund. The question arose whether a debt due to

the Board constituted a debt due to the Crown so as to be entitled to priority.

Held, that the appellant Board not being servants of the Crown acting in its service, the debt was not a crown debt so as to be the subject of priority.

ONTARIO JOCKEY CLUB *v.* MCBRIDE, (1927) A. C. 916 (P. C.).

Company—Transfer of shares—Right of pre-emption under by-law—Agreement by shareholder to observe by-law—Breach—Rights of transferee.

S. 54 of the Ontario Companies Act of 1912 provides as follows: (1) The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act .... or by-laws of the company may be prescribed. (2) No by-law shall be passed which in any way restricts the right of a holder of paid up share to transfer the same, but nothing in the section shall prevent the regulation of the mode of transfer thereof.

A by-law of the appellant club, passed in 1910, required that before any shareholder could transfer a share to any person not already a shareholder of the club, notice should first be given to the club and that it should have the right to sell the same to a purchaser at a price to be ascertained under the by-law or at any less price fixed by the seller. A certificate for certain shares issued to a shareholder in 1916 contained a restrictive footnote setting forth the above by-law and the shareholder accepted the shares subject to those terms. In 1923 he transferred one of his shares to the respondent who was not already a shareholder. When presented to the club, registration of the transfer was refused on the ground that there was a breach of the terms of the agreement. In an action to enforce registration,

Held, that, whatever may be the binding force of the by-law as such, the club was entitled to refuse to register the transfer because by the agreement of the transferor the shares were transferable only subject to the right of pre-emption expressed in the by-law.

Per Lord Wrenbury.—"Shares are *prima facie* transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may

be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid".

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* CANADIAN PACIFIC RAILWAY CO., (1927) A. C. 934 (P. C.).

Tax—Direct and indirect—Difference—Tax on fuel-oil—Nature.

While a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. Thus a tax levied on brokers, agents, factors or sellers is obviously indirect.

Held, that fuel-oil is a marketable commodity and therefore the tax levied thereon is an indirect one.

JOTTINGS AND CUTTINGS.

THE LATE SIR T. SADASIVA AIYAR.

REFERENCE IN THE HIGH COURT.

Touching references were made this morning (25th November, 1927) in the High Court regarding the sudden demise of Sir T. Sadasiva Aiyar yesterday evening at his residence in Royapettah. The Chief Justice and all the other thirteen Judges assembled in the second Court Chamber, the biggest hall in the High Court buildings. The hall was fully packed with practitioners and the important members of the executive staff of the Court were also present. Owing to the unavoidable absence of the Advocate-General, Mr. Venkatarama Sastri, Dewan Bahadur T. R. Ramachandra Aiyar, President of the Vakils Association, moved the reference.

Mr. T. R. Ramachandra Aiyar said:—"My Lords, it is my painful duty to bring to your Lordships' notice, in the absence of the Advocate-General who is absent from Madras, that the cruel hand of death has snatched away from us one of our best

men Sir T. Sadasiva Aiyar. His death was very sudden. Only a few days back, I heard through a friend that he was even unwell, and it is only day before yesterday that I heard he was seriously unwell and before I could make any enquiry, he is gone.

He was born in 1861 in the District of Tanjore. He had his early education in Kumbakonam. He had his guidance from those distinguished educationists, Messrs. Porter and Gopala Rao. He had a brilliant university career. He passed his B. L. and was enrolled in 1882. He worked for a time in the High Court with Mr. Guruswami Aiyar and I remember well those days, when he showed those eminent qualities which qualified him for the future. He became a Munsif afterwards. When he was a Munsif at Madura I went for a case there and curiosity took me to his Court. I found he was deeply engaged in the case. The vakils were standing around his seat and I found there was a kind of joy and satisfaction in their faces that testified to his great ability and sincerity of purpose. He subsequently became a Subordinate Judge and afterwards his services were lent to the Travancore Government and he was Chief Justice in Travancore for about 6 years. During that period, he gave a tone to the judicial administration of Travancore, and I know that even to-day his name is revered and respected by all in Travancore. He afterwards came as a District Judge and eventually was elevated to the High Court in 1912.

From that time we are all familiar with his doings as Judge. His fearless independence, his thorough honesty of purpose, his great patience, his knowledge of law and his intimate knowledge of men and things made him one of the most eminent Judges who adorned the High Court Bench. He was kind to the members of the Bar and to the establishment of the High Court, who had requested me to express their feelings to your Lordships. In fact, the juniors felt that they would receive great encouragement from him when they appeared before him. He would tell them, "Here is an opportunity to distinguish yourself in the absence of the senior and you will receive sufficient encouragement from the Bench." His judgment in the Poondi murder case was one of his early triumphs. His judgment in the Varadarajulu case established the supremacy of Law over the will of the executive and proved also his fearless independence.

Outside the Court, he moved very freely with all people, humble and elevated. He was President of the Mylapore Club and as such those in Mylapore were able to know him intimately and felt his great help to them. He subsequently became the President of the Endowments Board and he died in harness. That Board owes what little reputation it has to his great personality. My Lords, it is seldom that we have the rare good fortune of having such an eminent Judge discharging judicial functions in one of the highest Courts".

Mr. J. C. Adam on behalf of the Advocates of the High Court associated himself with the sentiments expressed by Mr. T. R. Ramachandra Aiyar. "Sir T. Sadasiva Aiyar", he said, "was a very just and upright Judge, and gained the esteem of his brother Judges, and the members of the legal profession. He was also well-known for his learning and he was esteemed not only in his judicial capacity but also in the outside and popular world. The speaker expressed his condolences to the relatives of Sir Sadasiva Aiyar on their sad bereavement".

The Chief Justice's Tribute:—The Chief Justice said :—Mr. T. R. Ramachandra Aiyar and members of the Bar, I desire to associate myself and my colleagues with what has been said by you on behalf of the bar about our late colleague, Sir T. Sadasiva Aiyar. In him a very distinguished figure has passed from our midst though, let us not forget, he had lived to a ripe old age after what, I am sure, was not only a useful but a happy life. His career seems to me to be a striking example of how far ability and devotion to duty may carry one who starts, as he started, from the bottom rung of judicial ladder. During the five years I served as his colleague on the bench I was nearly the whole period sitting on the original side; but for three months I had the advantage of being posted to sit with him to deal with miscellaneous civil work which, as you all know, is concerned largely with questions arising in execution, a subject on which he was a past master and I was totally ignorant. I shall never forget the patience and courtesy with which he tried to teach me how to handle such matters and bore with my inexperience. His colleagues used to chaff him—with entire good nature—as being prone to legislate from the Bench when he thought that the law lagged behind the real consciousness and the real needs of the people of India. But that sprung from qualities which no one could fail to respect—independence of

judgment and courage in speaking what was in his mind and an ardent desire to reform what he felt to be socially wrong conditions imposed by the fetters of law.

His mind was essentially liberal in the best sense. He had the equipment that goes to the making of a great Indian Judge. He was an accomplished Sanskrit scholar, a very learned lawyer and one who brought a very human personality to bear on the dry bones of law. His monument as a Judge remains in the numerous decisions of his which stand in our reports and which testify alike to his knowledge and to the breadth of his outlook. Though his was essentially a gentle and compassionate spirit, as a criminal Judge he had no sentimental pity for those who had committed cruel and heartless crimes, and to them he did not fail to mete out their fitting punishment.

But it is not alone as a just, able and conscientious Judge that he will live in the memories of those who knew him. He was essentially generous; in the narrow sense of that word he helped with gifts of money which his kindliness called loans to many poor students. This has come within my own personal knowledge; and I believe to more than one struggling practitioner at this bar. But he was generous in a wider and higher sense. He always took the best views of the motives that might be supposed to influence other men's actions and credited them accordingly, until it was forced upon him that his confidence was misplaced. That sometimes happened and he felt it very keenly. But it never soured him or made him cynical and he continued to believe the best of every one with whom he came in contact, until it was demonstrated that he was mistaken. Every one who worked under him on this bench regarded him with respect and real personal affection, as indeed all who knew him.

Mr. Ramachandra Aiyar, I ask you to convey the respectful sympathy of myself and my colleagues to Lady Sadasiva Aiyar and other members of the family in their bereavement. I would have wished to show my respect to his memory by being present at his house when the funeral ceremonies began, as no doubt many of my colleagues also. But the end was so sudden and the ceremony followed it so soon that time rendered it impossible".

His Lordship the Chief Justice and his colleagues then left the Court-hall to attend to their respective work [*The Hindu.*]

Journalism and the Bar:—So that point was settled; and it was of course notorious that many of the most able Judges began their legal career as solicitors. But a point which caused far more trouble and searching of heart was whether bar students and members of the Bar ought to exercise the art of journalism for reward. The Benchers of Lincoln's Inn went so far as to pass a resolution the effect of which would have been to exclude from the Society all persons connected with the public press. One of the banned persons petitioned the House of Commons and it is reported that the Benchers were flagellated in the debate which ensued. Sheridan was one of the most effective speakers and referred to Burke and Dr. Johnson as journalists who were obviously fit, not only for the bar, but for the highest offices in the State. In fine, the Benchers withdrew.

Yet it was said of Lawrence, J., who was in general remarkable for his courtesy, that he displayed towards such barristers as were connected with the press a roughness altogether opposed to his habitual urbanity. And his dislike was said to be justified by the fact that many of these men "employed the meanest artifices to obtain practices and endeavoured to acquire reputations by constantly inserting their names in the paper".

—*The Law Journal*, October 8, 1927, p. 247.

The Death of Serjeant Buz-Fuz:—More than ever recently writers and commentators have referred to the altered (and improved) tone of successful advocacy. The styles of Sir John Simon and Norman Birkett are referred to as typical; and no regret is expressed at the passing of the roaring, blustering methods which survived for long after the pen of Dickens had so searchingly described them. Truth to tell, the genus is not yet entirely dead, and if we have no genuine Buz-Fuz, we are not yet entirely free from the Blowhards of the Forensic Fable.

The increasing proportion of civil cases which are now heard by a Judge alone is largely responsible for the change. It is no good addressing a modern Judge "as if he were a jury", nor is it always profitable to cross-examine a witness in the antique fashion. But the big-voiced men of wrath are not quite extinct. They may be seen and heard sometimes at the Old Bailey; not infrequently in County Courts in running down cases; and occasionally even in the Royal Courts of Justice.

I once heard an Indian barrister—a rare instance—harangue their Lordships in the Privy Council as if they were an unusually common jury.

—*The Law Journal*, October 8, 1927, p. 247.

The New Lord Justice :—No surprise is felt by the profession at the appointment of Mr. Justice Greer to succeed Sir John Eldon Bankes as a Lord Justice of Appeal. Sir Frederick Greer, like many others who have become famous at the Bar and on the Bench, commenced his career at Liverpool, where he practised for more than twenty years. After coming to London and taking silk, he speedily became one of the most sought after leaders in the Commercial Court, and his was one of the first judicial appointments made by Lord Birkenhead. From the first he showed himself to be an ideal Judge ; learned, patient and courteous. His promotion to a higher grade in the judicial hierarchy was only a matter of time, and that it has come as early as possible—there has been no vacancy for a Common Law Judge in the Court of Appeal since his appointment in 1919 until now—is eloquent testimony to his great abilities and to the reputation which he has earned during the last eight years. Of Sir John Eldon Bankes the profession takes leave with great regret. He has for a number of years presided over one of the Courts of Appeal with an ability and a dignity which have added lustre to the Bench. He carries with him into retirement the affectionate respect of every member of the profession who has ever appeared before him.

—*The Law Journal*, October 15, 1927, p. 249.

A Question of Etiquette :—We notice a story in the Press as to the return of fees by counsel who is appointed to the Bench before the case is heard. It is said that, once upon a time, the firm who had paid the cheque suggested it should be returned, whereupon the new Judge explained that this would unfortunately be contrary to etiquette. "Yes, yes", was the answer, "we were afraid your Lordship would be in that predicament, and so we've stopped the cheque." No doubt this story is of the *ben trovato* order, but in fact the practice appears in former times not to have been uniform, some eminent Judges maintaining that it was not the usage to return fees under such circumstances. Sir John Hollams, however, in his "Jottings", relates one conspicuous example to the contrary. The first

intimation he had of the appointment of Lord Selborne as Lord Chancellor was the receipt of a cheque for fees which had been paid on a brief in the House of Lords. And that was a case where, Sir John Hollams goes on to say, a different course might have been followed. The papers were heavy, and Lord Selborne had been two days at the House of Lords waiting for the case to come on; yet he returned the whole of the fees. What is the present practice we forbear to speculate. And the question is not in all cases of practical importance, for the rule that fees are to be paid with the brief is not universally observed.

—*The Law Journal*, October 15, 1927, p. 251.

"Protesting" in a Cathedral :—The religious atmosphere at the present time seems to be charged with a very high degree of doctrinal electricity, and it is difficult to see how the cause of true religion can be promoted by what is undoubtedly a course of procedure that might lead to proceedings in the Courts. We gather from the newspaper reports that no such proceedings are likely to result from the incursion of a City vicar and his congregation into St. Paul's Cathedral last Sunday morning: but even so, is not the habit of procuring publicity for some grievance or for propaganda by deliberately challenging legal proceedings as in this case calculated to bring the law into contempt and disrepute? "Demonstrations" of every sort against established authority are not conducive to reform; they only tend to arouse more bitterness of feeling.

—*The Law Journal*, October 22, 1927, p. 273.

Sergeant Dowse's Views Thereon :—"The speech of his honourable and learned friend", said Mr. Dowse, in reply to Sir John Coleridge, "drifted in the direction of the argument that, if we had a female Sovereign, we might have a female Attorney-General, a female Speaker, a female Leader of the Opposition, and a female Prime Minister; and because this Bill was drifting into that he did not see his way to voting for it. He was quite aware that many a Judge had been an old woman; but that was no reason why every old woman ought to be a Judge". Lord Coleridge himself laughed at this sally and quoted it much in after years. But it was a poor argument, and sounds remote in our own day when women are, in fact, members of the Government.

Dowse had probably in mind a Judge of his own country, commonly referred to as "the old woman". He it was who on one occasion tried to dam the flow of speech of an old lady who insisted on telling the Court what she would do if she were on the Bench. "An old woman is not fit for the Bench", he cried; to which she made answer: "Shure your lordship ought to know from experience".

—*The Law Journal*, October 22, 1927, p. 288.

Killing in Mercy :—The case before Mr. Justice Branson at the Chester Assizes last Saturday, in which a father, who was alleged to have drowned his child in order to put an end to its sufferings, was acquitted on the charge of murder, has received wide and sympathetic notice in the Press. Murder is defined as unlawful homicide with malice aforethought. "Malice aforethought" implies that the homicide is intentional; "unlawful" that it is without just cause or excuse. Just cause or excuse may exist in many cases; notably in the exercise of theh right of self-defence; but the law does not recognise it in circumstances like those in the Chester case. "The law of this country", so the learned Judge directed the jury, "puts so much store upon human life that it could not allow a man, even from the best of motives, to take a life". The jury in returning a verdict of not guilty, may have considered that the child was really dead before the father, as he thought, drowned it. Otherwise the verdict showed that the jury declined to administer a harsh law. Of course, the problem of "euthanasia" is not new, and it is a question whether the jury should intervene on compassionate grounds, or whether the correct verdict should be returned, and the event left to the prerogative of mercy. We see that Sir Arthur Conan Doyle has made the suggestion that three medical certificates should suffice. But what course doctors really take when death is certain and agony intense is a question of medical practice which does not call for minute inquiry. The Judge found, in fact, though not in law, "a motive of love and pity for the child's suffering" to be a sufficient excuse. We notice that in the Petlura case in Paris the old plea *Sic semper tyrannis* has been allowed to be a sufficient excuse.

—*The Law Journal*, October 29, 1927, p. 290.

Criminal Appeals :—The value of the Court of Criminal Appeal is not to be estimated only by the number of successful

appeals which are made to it; its very existence necessarily engenders a greater carefulness in the Courts of first instance. Recently, however, the Lord Chief Justice, Avory and Salter, JJ., have reversed a considerable number of decisions, and in other cases have made substantial reductions in sentences passed by the lower courts. Perhaps the most significant of the cases is that of *Rex* v. *Watson,* in which a sentence of five years' penal servitude was reduced to one of nine months' hard labour, after a conviction at Middlesex Sessions on a charge of sacrilege in breaking into a church at Potter's Bar and stealing therefrom the sum of eightpence. It is, of course, a fact generally recognised that even a highly qualified magistrate may take an unduly harsh view of a particular offence or of a particular kind of offender; and it is of supreme importance that the resulting sentences should be subject to revision by a tribunal composed of Judges of undisputed eminence and impartiality. This is the great merit and justification of the Court of Criminal Appeal.

—*The Law Journal,* October 29, 1927, p. 291.

Reduction of Sentence :—The Court of Criminal Appeal (Lord Chief Justice, Mr. Justice Avory and Mr. Justice Salter), on Monday, the 24th instant, criticised a sentence passed by Sir Montagu Sharpe, K. C., the chairman of the Middlesex Sessions, on George Watson, who had been convicted of sacrilege.

The Lord Chief Justice, in giving the judgment of the Court on Watson's appeal against sentence, said that Watson had stolen eightpence from a church at Potter's Bar. Watson was aged 72, and since 1890 he had had 20 convictions recorded against him, four of them resulting in sentences of penal servitude. In 1923 a sentence of five years' penal servitude was passed on him at Middlesex Sessions for stealing, but it was reduced to three years' penal servitude by the Court of Criminal Appeal.

Sir Montagu Sharpe, in passing sentence on the present occasion, thought right to observe that if Watson's previous sentence had not been reduced he would have been in prison at the time of his last offence, and, therefore, could not have committed it. It was not very easy to follow the reasoning which underlay that statement, but, on one view of it, it seemed to say that everyone who was sentenced had better be sentenced to penal servitude for life lest he should commit another offence.

A proper sentence to be passed on Watson was nine months' imprisonment with hard labour.

—*The Law Journal*, October 29, 1927, p. 305.

Surrejoinder, Rebutter, and Surrebutter :—Rejoinders I have seen in and about the Royal Courts of Justice on several occasions; but mine eyes have not yet beheld any modern example of the Surrejoinder, the Rebutter or the Surrebutter. These three, according to Bullen and Leake, "are now very seldom seen". This cautious and regretful reference appears to imply that they have been observed on recent occasions; yet if any man told me he had seen a Surrebutter since the war, I should accept his statement with as much reserve as if he informed me he had seen a ghost. No; there are no great fortunes made nowadays from such draftings. The Statement of Claim, the Defence and Counterclaim, the Particulars and the Further and Better Particulars suffice for our simple needs.

Baron Parke—otherwise called Baron Surrebutter—was in his day and generation the great authority on such matters, and it is told how he sought to cheer a dying friend by producing a "special demurrer" at the bedside. "It was so exquisitely drawn", he observed, "that I felt sure it must cheer him to read it". That story is apocryphal which states that when spirits and ordinary restoratives failed, he was once brought out of a fainting fit by the rough but incredible device of putting an ancient and musty collection of pleadings in the neighbourhood of his nose.

—*The Law Journal*, October 29, 1927, p. 306.

Legislation by "Regulations" :—The Master of the Rolls has now emphatically associated himself with the protests made by the Lord Chief Justice here and in America against bureaucratic tyranny. As the guest of the Metropolitan Grocers' Association, Lord Hanworth, replying to the toast of "The Houses of Parliament", commented upon some remarks made by the proposer of the toast, who complained of the harassing of retail traders by departmental regulations and bureaucratic interference generally. The learned Master of the Rolls observed that there was no question whatever that this matter was engaging public attention with greater force and weight than ever before. During the war they had a taste of regulations cheerfully submitted to, but they then learned how unpleasant

"Dora" was. He was prepared to associate himself with what had been said by the Lord Chief Justice, who had on two occasions recently protested against Parliament handing over its functions to permanent officials, and having regulations instead of legislation. In his opinion, the control exercised by laying regulations on the table of the Houses of Parliament was one that did not lend itself to action, but he thought that if members would more frequently put down motions to reject regulations so laid upon the table, that would be an impediment to such regulations going through until the matters they dealt with had been openly discussed.

—*The Law Journal,* November 5, 1927, p. 307.

The Ethics of the Problem :—It must be admitted that the law as to betting and gaming is in an unsatisfactory state; it not only discriminates—in the result—between rich and poor by permitting credit betting and prohibiting what is known as ready-money betting away from race-courses, but it discriminates between various sorts of gaming in an altogether illogical manner. Mr. A. P. Herbert, in a letter published in Monday's *Times,* draws attention to this, and it is impossible not to agree with him. And we wish him well in the crusade which he apparently intends to undertake to get the law put on a more sensible footing. But when Mr. Herbert suggests that there should be "equity between the vices" of drink and betting with regard to taxation—he points out that whisky is taxed 60 per cent., and betting 2 per cent.—he is, we think, befogging the issue he himself has raised. Neither drink nor betting is taxed because it is a vice; each is taxed to provide revenue. There is a point at which indirect taxation becomes so heavy that it results in a diminished revenue; the tax on spirits has not yet passed that point; and we may be sure that if the authorities are of opinion that the betting tax can be increased without risk of such a loss, it will be increased. If, as Mr. Herbert's argument would appear to suggest, the rate of tax on "vices" is proportionate to the official view of their harmfulness, what vicious persons those of us who consume tobacco must be considered to be.

—*The Law Journal,* November 5, 1927, p. 308.

Young—For a Lord Chancellor :—Lord Cave, who recently denied in vigorous and unequivocal terms an unfounded

rumour of his alleged intention to retire from the office of Lord Chancellor, is seventy-one, very young for an office which has at all times proved one of the healthiest occupations in the realm. Indeed, the exceptions are so few that it may be said with truth that Lord Chancellors never die, and never voluntarily retire from their great responsibilities. Lord Cave says that he can do his twelve hours a day without fatigue or any indication that the years have impaired the quality of his work; and this is manifestly so. Ignoring for the moment—and only for the moment—such youthful prodigies as Lord Birkenhead, the present Keeper of the King's Conscience is, for a Lord High Chancellor, a mere stripling. The late Earl of Halsbury occupied the Woolsack, and delivered good, confident and impressive judgments until the year 1905, when he was eighty-two years old. The "Lives of the Chancellors" include many who were, if anything, not quite old enough at seventy years.

—*The Law Journal*, November 5, 1927, p. 323.

A Feudal Survival :—That some relics of feudalism, however futile and fantastic, still linger in the land is a fact which annually brings a tear to the appreciative eye of the lover of legal antiquities. Whereby the recent rendering of quit-rent services by the Corporation of the City of London in respect of the Moors in Shropshire and the Forge in St. Clement's Dane evoked great interest and publicity. The Crown, in the person of the King's Remembrancer, Sir George Bonner, appropriately dressed for the occasion, received the services, but unfortunately they were rendered by the City in the person of a solicitor; a good man and true, no doubt, but still, a solicitor. In my opinion, the Lord Mayor's Coachman would more appropriately have filled this mediæval part.

For the Moors, a hatchet and a bill-hook; and for the Forge, six horse-shoes and sixty-one nails. Why the odd nail? It would be erroneous to suppose that the King's Remembrancer has by him an accumulated store of hatchets, bill-hooks and horse-shoes. Apparently they find their way back to the City after the ceremony and in due course appear again annually at each succeeding rite. It is authoritatively stated that the horse-shoes have so done duty for five centuries; and that the Forge was that granted to Walter le Brun in 1235 by the Knights Templars, for his good work in shoeing the horses for the tournaments by the river.

—*The Law Journal*, November 5, 1927, p. 323.

The Husband's Lost Dominion :—Once again a misguided husband has unconsciously and unsuccessfully relied on the law as stated in Bacon's Abridgment that he "hath by law power and dominion over his wife, and may keep her by force within the bounds of duty and may beat her, but not in a violent and cruel manner". It was left to Mr.. Rooth to put this husband right in his law and to fine him for the assault upon his wife, and further to warn him of the possibility of "durance vile" if he persisted in giving a demonstration of power and dominion no longer recognised by the law.

Herein may be observed the distinction between an old Common Law rule and a provision in an antique, but unrepealed statute. If that passage from Bacon had appeared in such a statute, it could not be rejected as a defence, although means would, no doubt, be found, by misinterpretation, of getting round it. The obsolete statute is of little use in modern times as a sword, although it may on occasion be a satisfactory shield. This law of husband and wife certainly needs an up-to-date remedy. Alas (say some reformers), the masterful powers of the husband to kick and even to kiss his wife have gone; but in many serious matters he is liable for her deeds and misdeeds as if these mediæval powers and privileges were still in full legal force and operation.

—*The Law Journal*, November 5, 1927, p. 323.

MaCardie, J., on Women :—For one reason, if for no other, many married and legal men are glad that McCardie, J., continues to be free from matrimonial embarrassment. Who but a bachelor could say what he did in fact say last week about women in a breach of promise action in which, moreover, the only counsel appearing was a woman? Some folk are apt to regard his observations as the immature speculations of an unmarried youth who knows nothing about women. I do not share those views. He can see facts as clearly as any married Judge. One does not say he is more courageous than they; but he is more free.

The Lord Chief Justice, Eve, J., and others have espoused the cause of law in general in its opposition to the encroachments of the bureaucracy. It is for McCardie, J., to use every legitimate opportunity in pointing out and denouncing the legal hardships which a modern husband so patiently endures. In the law of torts the injustices to man are manifest; the

waters of Equity are greatly troubled by them; they appear in almost every branch of law, and it is high time they were removed.

—*The Law Journal,* November 5, 1927, p. 323.

BOOK REVIEWS.

PROVINCIAL SMALL CAUSE COURTS ACT, by K. J. Rustomji, Barrister-at-law, 3rd Edition, 1927. Published by Puri Brothers, Lahore. Price Rs. 5.

This is the third edition of the law and practice of the Mofussil Small Cause Courts Act from the pen of a well-known author. Mr. Rustomji is widely known in this country to lawyers and judges for his valuable commentaries on various enactments and especially on the Indian Limitation Act. We are accustomed to associate with his name a not mere enumeration of cases but a critical analysis of them with often times the evolution of a principle. The commentary on the Provincial Small Cause Courts Act deals fully with the law and practice on the subject and it may be asserted that in bringing out this edition, he has carefully considered his conclusions expressed in the previous editions on the various topics. The various modifications in the enactment and the case-law up to December, 1926, have also been incorporated. We have no doubt that the book under review fully maintains the high level of the author's publications.

SPECIFIC RELIEF ACT, by S. C. Sarkar, 5th Edition. Published by M. C. Sarkar & Sons, Calcutta. Price, Rs. 6.

The Specific Relief Act embodies the leading principles of equity with reference to contracts and injunctions without leaving us to find them out from the various English decisions and text books. A handy and upto date commentary on the Act is almost a necessity to practitioners and this is furnished in the volume under review by Mr. S. C. Sarkar who is already familiar to us as the author of the Law of Evidence and other works. Considerable portions of the book have been re-written with the result that it has increased by about 125 pages over the prior edition. The cases and the enactments have been carefully noticed in the commentary in their appropriate places. This edition is a distinct advance upon the previous ones and is therefore likely to be appreciated better.

THE INDIAN REGISTRATION ACT, by K. K. Vaidya, M.A., LL.B., Solicitor, High Court, Bombay. Price Rs. 3.

This is a book mainly intended for the students and the beginners of law who cannot start without a working acquaintance of the provisions of the Indian Registration Act and the leading decisions under it. The legislative amendments upto date and the cases upto the end of September, 1927, have been incorporated. The important bills pending before the Indian Legislature for amending the Registration Act are also noticed in the appendix to the book. We have no doubt that the book will be found useful by those for whom it is intended.

THE CODE OF CIVIL PROCEDURE, 1908, by K. N. Katju, M. A., L.L.D., and S. C. Das, M. A., L. L. B. Published by Allahabad Law Journal Press. Price Rs. 4

There have been so may amendments both by the legislature and by the various High Courts under their rule making power that we are apt to be behind hand without an upto date edition of the Code. The present edition of the Code gives it as amended upto 1927, with all the rules made by the High Courts. The get up of the book is excellent and we are sure that it will be found useful.

THE MADRAS ACTS, CRIMINAL, 1802-1927, by P. Hari Row, B.A., B.L. Published by T. A. Venkaswamy Row, B. A.

We have great pleasure in acknowledging the receipt of a copy of the Madras Acts, Criminal, 1802-1927, by Mr. P. Hari Row and published by T. A. Venkaswami Row, B. A.

THE MADRAS CRIMINAL RULES OF PRACTICE by K. Jagadisa Aiyar. Published by M. K. Srinivasa Aiyangar. Price Rs. 3.

This is a publication of the Criminal Rules of Practice revised till the end of August, 1927. The book is divided into two parts; part 1 includes all rules of practice which may be called judicial rules passed by the High Court and part 2 includes the executive orders of the Government. The Editor has also appended to the various rules marginal notes, explanations and cross references. We have no doubt that the publication will be found useful by practitioners in the Criminal Courts.

POLICE DIARIES AND STATEMENTS (CIVIL AND CRIMINAL LAW SERIES) by M. K. A. Khan, K. S., M.A., L.L.M., Advocate, High Court, Lahore, and Public Prosecutor. 2nd Edition, 1927. Price Rs. 5-8-0.

This is the second edition of the useful publication giving a critical discussion of the provisions of S. 152 of the Criminal Procedure Code and S. 145 of the Evidence Act, with the case-law thereon of the various superior Courts in India and of the Privy Council. The subject is one of constant interest in the Criminal Courts and a work of this description is sure to be found helpful by all those having to deal with the practice of the Criminal Law in this country. The popularity of the work may well be judged by the circumstance that a second edition was called for in about a year after the first. The case-law has been brought quite upto date and considerable portions have been completely revised and re-written. In short the reader can find all useful information on the subject and the connected topics in the volume under review.

GHOSH'S DIARIES, 1928.

We welcome the popular Ghosh's Diaries. They are issued in various sizes to suit the requirements of customers. The get-up is excellent.

[END OF VOLUME LIII.]